

MINUTES  
NATIVE AMERICAN GRAVES PROTECTION AND REPATRIATION  
REVIEW COMMITTEE  
FIRST MEETING: APRIL 29-MAY 1, 1992  
WASHINGTON, DC

The first meeting of the Native American Graves Protection and Repatriation Review Committee was called to order by Dr. Francis P. McManamon, Departmental Consulting Archeologist, at 9:10 a.m, Wednesday, April 29, 1992, at the main building of the Department of the Interior, Washington, D.C. The meeting was adjourned at noon on Friday, May 1, 1992. The following Review Committee members, staff, and others were in attendance:

Members of the Review Committee:

Ms. Rachel Craig  
Ms. Tessie Naranjo  
Dr. Martin E. Sullivan  
Mr. William Tallbull  
Dr. Phillip L. Walker

Members absent:

Mr. Dan L. Monroe (participated in conference call on May 1, 1992)

National Park Service staff present:

Mr. Jerry Rogers, Associate Director for Cultural Resources  
Dr. Francis McManamon, Departmental Consulting Archeologist  
Dr. C. Timothy McKeown, Archeological Assistance Division  
Dr. Veletta Canouts, Archeological Assistance Division  
Dr. Ruthann Knudson, Archeological Assistance Division

The following others were in attendance (at least part of the time):

Mr. Timothy Glidden, Councilor to the Secretary  
Ms. Jennifer Salisbury, Deputy Assistant Secretary, Fish and Wildlife and Parks  
Mr. Lars Hanslin, Solicitor's Office, Department of the Interior  
Mr. Robert Moll, Solicitor's Office, Department of the Interior  
Mr. Jim Bird, Shea & Gardner  
Mr. David Cole, president, Keepers of the Treasure, Inc.  
Ms. Karen Funk, attorney, Hobbs, Straus, Dean & Wilder  
Ms. Jo Anna Meninick, Culture Committee, Yakima Nation  
Mr. Tom McCulloch, Advisory Council on Historic Preservation  
Ms. Diane White, attorney, Shea & Garner  
Mr. Raul N. Zinn, Voice of America

Dr. McManamon advised that notice of the meeting had been published in the April 15, 1992 Federal Register (copy appended as Attachment 1 to the minutes) and identified himself as Designated Federal Officer for the meeting. He agreed to serve as chairman until such time as the seventh member of the Review Committee is appointed by the Secretary and the members can elect a chairperson. He thanked the Review Committee members for agreeing to serve on the committee and for arranging their already busy schedules so they could attend this first meeting. He then proceeded by providing a brief introduction of each Review Committee member.

Councilor to the Secretary

After his introductions of the Review Committee members, Dr. McManamon introduced Mr. Timothy Glidden, Councilor to the Secretary, who welcomed the Review

Committee to Washington for the Secretary. Mr. Glidden recalled that Secretary Lujan's interest in ensuring more sensitive treatment of Native American human remains and other cultural items predated passage of the Native American Graves Protection and Repatriation Act (NAGPRA). The Secretary has worked diligently toward implementing the statute, his efforts including:

- o requesting and obtaining funding to establish the Review Committee and undertake other implementation activities,
- o chartering the Review Committee and soliciting nominations from which this august group ultimately was appointed,
- o assigning responsibility for implementing some provisions of the statute to the Departmental Consulting Archeologist (DCA) and the Archeological Assistance Division (AAD) of the National Park Service.
- o developing the initial draft of the implementing regulations which the Review Committee would be discussing at this first meeting.

Mr. Glidden identified this first meeting of the Review Committee as an important milestone in the implementation and emphasized that Secretary Lujan considers the committee's work to be critical to the preservation of Native American cultural items.

#### Deputy Assistant Secretary for Fish and Wildlife and Parks

Dr. McManamon introduced Ms. Jennifer Salisbury, Deputy Assistant Secretary for Fish and Wildlife and Parks, who welcomed the members to their first meeting on behalf of Assistant Secretary for Fish and Wildlife and Parks Michael Hayden. She said that both she and the Assistant Secretary take their responsibilities under NAGPRA very seriously and that she is personally happy to have the opportunity to work together with the Review Committee to ensure the fair implementation of the statute's provisions. She pointed out that the Assistant Secretary's office was instrumental in obtaining FY 1992 appropriations to enable the members to come together as a chartered Review Committee to begin the crucial task of advising the Secretary. She anticipates the development of a strong working relationship with the Review Committee.

#### Associate Director, Cultural Resources, National Park Service

Dr. McManamon introduced Mr. Jerry Rogers, Associate Director for Cultural Resources, National Park Service. Reflecting upon 25 years of service in Washington, Mr. Rogers remarked that he is extremely optimistic about the current efforts to implement NAGPRA. Mr. Rogers pointed out that current efforts to implement the statute exist within the context of a variety of cultural resource programs administered by the National Park Service -- the National Register Program, the Historic American Building Survey/Historic American Engineering Record, the Archeological Assistance Division, the Tax Incentive Program, as well as National Park System programs in historic architecture, history, archeology, and ethnography. He specifically recognized the Tribal Historic Preservation Grants program as being instrumental in providing the foundation for Keepers of the Treasures, a group which he hopes will eventually develop into the Native American equivalent of the National Trust for Historic Preservation. Mr. Rogers pointed out that there is more money devoted to these programs now than at any time in his 25 years in Washington, and he singled out the senior level of administrators with the Department of the Interior -- referring specifically to Secretary Lujan, Assistant Secretary Hayden, and Deputy Assistant Secretary Salisbury -- as being responsible for what he considers the best of times for heritage preservation.

### NAGPRA Program Staff

Dr. McManamon introduced Dr. Timothy McKeown and Mr. Lars Hanslin. Dr. McKeown was hired by the National Park Service-Archeological Assistance Division (AAD) as NAGPRA Program Leader, thanks to the funding previously mentioned by Ms. Salisbury. Among Dr. McKeown's roles are supervising development of the draft regulations and coordinating activities for the Review Committee.

Mr. Hanslin serves with the Solicitor's Office within the Department of the Interior and specializes in matters related to the implementation of cultural resource laws. Dr. McManamon thanked Mr. Hanslin for making himself available over the next three days to answer any legal questions that come up.

### Review of the Agenda

Dr. McManamon reviewed the meeting agenda (copy appended as Attachment 2 to the minutes). Besides getting to know one another, there were two major issues which needed to be investigated during the meeting. The committee would be reviewing the current draft of the regulations, identified as Draft Four. The committee also needed to develop a list of nominees from which the Secretary could appoint the committee's seventh member.

### Regulatory Process

Dr. McManamon introduced Mr. Hanslin, who outlined the regulatory process for members of the committee. Regulations implement the law -- explaining any ambiguities or gaps left by the statute -- but the regulations may not contradict the law. As you might imagine, Mr. Hanslin explained, that is not always an easy line to discern.

Mr. Hanslin's job, on behalf of the Secretary, is to make sure the regulations are consistent with the statute and other Federal law. He does this in two ways -- by assisting the Review Committee and by advising the Secretary. Mr. Hanslin pointed out that the Review Committee need not take his recommendations, they are entitled to make whatever recommendations they consider appropriate to the Secretary. However, once the draft Proposed Regulations are given to the Secretary, Mr. Hanslin's role is to review them on the Secretary's behalf. The Secretary has ultimate responsibility for their content. Once approved by the Secretary, the draft Proposed Regulations are sent to the Office of Management and Budget (OMB) to be reviewed under the Regulatory Reform Program. Part of this program has been the 90 day moratorium on new regulation, which is probably going to be extended for another 90 days. (The moratorium has subsequently been extended until November, 1992). Once OMB approves the regulations, they will be issued as Proposed Regulations in the Federal Register. Publication will include not only the entire text of the regulations, but also a preamble which in narrative form describes what the regulation is intended to do and defines a period during which public comment will be accepted. This period of public comment is typically no less than sixty days and, in the case of these regulations, probably longer.

Once all the public comments are received, the Review Committee, the Department, and the Secretary are obligated to review the comments -- not just read them -- but actually review them and respond in written form. The Secretary is obligated to make a public record to demonstrate that all comments have been considered fully taken into account. Following this comment and review process, Final Regulations will be developed and will again have to pass through OMB before they are published in the Federal Register. The preamble to the Final Regulations will discuss in general terms all the comments received and how they were dealt

with -- identifying which sections were changed and which were not, and justify why. All substantive issues raised by the comments must be dealt with in the preamble. Mr. Hanslin predicted that while the NAGPRA regulations themselves may not be very long, the preamble will be quite lengthy.

### Historical Background

Dr. McManamon updated committee members on the activities taken by the DCA and AAD thus far to implement the statute. He explained the leadership role this office provided for the Department of the Interior in the preservation and protection of Native American cultural items even before passage of the statute because of its oversight, leadership, and coordination responsibilities for archeological issues. Staffing was provided for Departmental representatives, such as in drafting testimony for officials appearing before Congress and responding to inquiries on these issues from the public. The DCA and AAD helped coordinate the activities of other bureaus within the Interior Department -- the Bureau of Indian Affairs, the Bureau of Land Management, the Fish and Wildlife Service, etc. -- as well as with other offices within the National Park Service like the Tribal Historic Preservation Office, the Curatorial Services Division, and the Ethnography Program. The DCA and AAD played a central role as the Native American Graves Protection and Repatriation Act moved through the Congress.

The DCA and AAD leadership role came from its expertise in several specific areas addressed by the statute -- site protection, site preservation, the treatment of remains from archeological collections, the treatment of archeological collections generally. The DCA and AAD also worked with Native American individuals and tribes on a number of issues, including providing training to tribes for protecting archeological sites on tribal land and also developed regulations on consultation with Native Americans. The Division was aware and sympathetic to many of the issues raised by the Native American community. The Division's expertise involves historic preservation issues, archeological issues, and scientific issues. One of the functions of the Review Committee is to insure that the Native American perspective is articulated in the regulations and in the review of disputes.

The statute was passed very late in the cycle for the Administration's FY92 Federal budget. It was impossible to get any additional funding for fiscal year 1991. Information was prepared to justify increasing the FY92 budget to allow for the formation of the Review Committee, drafting of the regulations, and supporting various activities. This effort succeeded due to the firm support of the Assistant Secretary and the Secretary.

Between March and August of 1991, the DCA and AAD worked on formally establishing this committee. This included drafting the committee charter, based on the statute, which was reviewed formally throughout the Department. The charter was approved by many of the assistant secretaries' offices and at least three separate parts of the solicitor's office. Mr. Hanslin reviewed it, as well as the assistant solicitor for general law and the assistant solicitor for Indian affairs. That review process is one of the requirements for establishing a formal Federal advisory committee. Without the charter, this committee would not exist. The charter was approved in August of 1991.

At the same time, the Secretarial Order was drafted, reviewed, and approved assigning the Secretary's responsibility to provide staffing for the Review Committee, to assist in assembling the nominations for the Review Committee, to draft the regulations, and to administer the grants program when funding is provided to the DCA and AAD.

Although no new funding for implementation activities was available, AAD was able to use what is called "lapse money," money for a position that had not been filled, to bring in one of our regional office staff to help. Larry Nordby, of the NPS Southwest Cultural Resource Center, performed admirably in this role. He drafted the charter and helped move it through the review process. He and Dr. McManamon also developed a paper which eventually appeared in October, 1991, as the memorandum on implementation of the NAGPRA. Comments on the draft memo were solicited from a wide range of Native American, scientific, and museum organizations and individuals. On the Native American side, comments were received from the Native American Rights Fund, the Association for Native Americans, as well as from a number of individuals who had been intimately involved in drafting the statute -- including Jack Trope, Karen Funk, and Dean Suagee. Comments also were received from the Society for American Archeology and other scientific organizations. We tried to integrate those comments into the memorandum. Mr. Hanslin and others at the Solicitor's Office reviewed the document. A good faith effort was made to integrate comments into the document.

Mr. Hanslin reminded the committee members that the October 30th memorandum was preliminary and subject to change within the regulatory process. Its purpose was to promulgate some information related to the statute to the public without having to take positions before the government and the review committee were ready to do so.

With the October memorandum as a foundation, Dr. McManamon continued, effort was devoted to putting down on paper an initial draft of the regulations implementing the statute. We asked a number of individuals from Federal agencies to help us in putting together this draft. We limited membership on the Interagency Working Group to Federal officials -- to do otherwise would have involved the complexities of forming yet another Federal advisory committee. Members were drawn from agencies with experience dealing with Native American issues, such as the Bureau of Indian Affairs, as well as land management agencies and agencies responsible for collections. The Interagency Working Group met twice, in December, 1991, and once in January of this year. The result of their efforts is what you have in front of you right now.

#### Review of NAGPRA Regulations: Draft 3

Review of Draft 3 of the Regulations opened with a general discussion of the importance of expedient action to fully implement provisions of the statute.

Dr. Sullivan stated that completing the regulations may turn out to be easier than anticipated, since many museums recognized the need for better communications with Native Americans even before the law was passed. What museums need now are guidance and examples. Dr. Walker concurred with Dr. Sullivan's call for expedient action, stressing that conscientious museums may start the summary and inventory process early, only to face the possibility of having to redo their efforts once the final regulations are completed. He went on to express his concerns that the grants program authorized by the statute has thus far not been funded. The lack of funding impacts upon the ability of museums to comply with the summary and inventory provisions by the deadlines stipulated by the law.

Mr. Tallbull raised the question of determining title of cultural items picked up by military officers during the various police actions against the Indian Nations during the 19th Century. Many chief's bundles and private medicine bundles were taken, and these are now in museums. If no one has formal title, than who owns them? Dr. McManamon explained that if a museum cannot demonstrate a right of possession through a receipt or an authorization to excavate signed

by a tribal representative, the title would go to the closest lineal descendent, culturally affiliated Indian tribe or Native Hawaiian organization.

Dr. Sullivan questioned including "human remains" within the definition of "cultural item." Dr. Walker concurred that this usage seems offensive, and questioned how much leeway the committee had to deviate from the statutory language. Mr. Hanslin responded by explaining that perhaps the best way to deal with definitions which are defined in the statute is to use the statutory language, but to use language from the committee reports, statements made on the floor of Congress, and the congressional reports to further clarify the meaning.

Mr. Tallbull stated that one of the most important issues raised by this statute concerns just what constitutes proper treatment and protection. These things are risky. He recounted a reburial he was asked to participate in of a man who lived seven thousand years ago. The man had been buried with his head to the west, facing north. Mr. Tallbull knew this practice, so he was comfortable doing the reburial. But suppose the man had been a "contrary." He would have done everything backwards, and whatever Mr. Tallbull would have done would have been exactly the opposite of what should have been done.

Dr. McManamon proceeded to read and explain the rationale behind each section.

#### § 10.1 Purpose

The committee members had no comments on this section.

#### § 10.2 Authority

The committee members had no comments on this section

#### § 10.3 Applicability

Dr. Walker asked about the status of cultural items recovered by Federal agencies but currently in the collections of the Smithsonian. Dr. McManamon explained that the Smithsonian's policy is that all material that has been accessioned will be considered the responsibility of the Smithsonian. The Smithsonian has expressed willingness to talk with individual agencies about who would actually be responsible for the cultural items. Dr. Walker and Dr. Sullivan suggested that Federal agency responsibility for their collections currently curated by museums needs to be made very explicit.

Ms. Craig asked about the applicability of the statute to lands controlled state or local governments. Dr. McManamon explained that provisions of the statute dealing with current excavations are limited to Federal and tribal lands.

Dr. Walker asked about the sentence "In the event that items were removed from Federal lands which later were transferred from the administrative control of one agency to another, the agency managing the lands at the time of the removal is responsible with the provisions of this Act with respect to those items, unless ownership of the collection has been otherwise conveyed."

Dr. Walker could not find any reference in either the statute or the draft regulations concerning the transfer of ownership of cultural items transferred from one Federal agency to another. Dr. McManamon explained that Federal agencies frequently switched management responsibilities. There are two ways to handle this. One way is to assign responsibility to the Federal agency assuming administrative control of the land. The other is to assign responsibility to the

Federal agency controlling the collection. This draft reflects the latter approach, since that is what the Interagency Working Group decided. Dr. Sullivan voiced his concern over the use of the term "ownership" in this context, preferring instead "control" or "custody."

#### § 10.4 Definitions

##### *(a)(4) museum*

Dr. Sullivan pointed out that representatives of the National Museum of Natural History have indicated that they would conducting their repatriation activities under provisions of this statute, despite the fact that they are explicitly excluded under this definition.

Dr. Walker asked what constitutes "receiving Federal funds". Mr. Hanslin explained that this is an issue that has litigated to the Supreme Court in terms of Title 11 funds. It seems clear from the present tense phrasing that the Federal funding must have been received after November 16, 1990. The question of local government museums that receive pass-through Federal funding from their city governments needs to be resolved.

##### *(a)(7) Indian tribe*

Dr. Walker asked for clarification of the phrase "eligible for the special programs and services provided by the United States to Indians because of their status of Indians." Mr. Hanslin explained this is a legal term of art which is precisely defined, though there will be some grey areas.

Dr. McKeown asked whether inclusion of Native Hawaiian organizations, which are recognized by their state but not by the Federal government, provides a precedent for including all State recognized tribes. Mr. Hanslin stated that no such precedent was established.

Dr. McKeown asked whether the tribes receive funds from other Federal agencies, such as from the Department of Health and Human Services, would also be included. Mr. Hanslin said that the definition includes funds from any Federal agency, not just from the Bureau of Indian Affairs.

##### *(a)(11) traditional religious leader*

Dr. Walker pointed out that not all tribes have traditional religious leaders as part of their government bureaucracy. Dr. McManamon explained that the statute required that traditional religious leaders be consulted regarding identification and proper treatment of cultural items, but that it was the Indian tribe and Native Hawaiian organization officials who were charged with making the ultimate decisions. This reflects the government to government relationship recognized between the Federal and tribal governments. Mr. Hanslin pointed out that the Federal agency and museum officials also must make sure that they are dealing with some legitimate representative of the Indian tribe or Native Hawaiian organization.

Ms. Craig took issue with the term "leader." She explained that in her area, many of the individuals who are recognized as experts in traditional religion by members of the community are not actual practitioners of the traditional religion. They follow traditional values. Mr. Tallbull suggested the term be changed to "elder." Dr. McManamon stated that the definition seemed to address everyone's concerns, while the term may be inappropriate. Mr. Hanslin explained that it was possible to change the term in the regulations, as long as it is stipulated that the term satisfies the statutory requirements for "traditional

religious leader." Dr. McManamon suggested that the review committee pay particular attention to the consultation section (§ 10.6) where procedures for identifying and contacting appropriate traditional religious leader are specified.

*(b)(2) associated funerary objects*

Ms. Craig wondered about hunting implements or beads that might be left with burials. Dr. McKeown explained that Navajo often leave utilitarian objects with or near their deceased owner. Contemporary Navajo still recognize that if they find an object, such as a spoon, on a site, that there is a burial nearby. Ms. Naranjo pointed out that the kinds of utilitarian objects left with burials is continuously changing. Dr. McKeown suggested amending the first category of associated funerary objects as follows: "cultural items that, as part of the death rite or ceremony of a culture, are reasonably believed to have been **intentionally** placed with **or near** human remains."

Dr. Sullivan asked for clarification for second category. Dr. McManamon explained that category two includes those artifacts which were not found directly associated with human remains, but that are known from other studies of the prehistoric or historic culture to have an exclusive burial function. This might include a particular type of ceramic jar that was invariably used to hold cremated remains. Dr. Sullivan asked about utilitarian vessels which might also be used for cremations. Dr. McManamon pointed out that the term "exclusively for burial purposes" comes from the statute.

*(b)(4) sacred objects*

Ms. Naranjo suggested changing the wording of the first line of this to "specific ceremonial objects which are needed ~~by traditional Native American religious leaders~~ for the practice..." to reflect the previous decision on § 10.4 (a)(11).

Ms. Naranjo, Ms. Craig, and Mr. Tallbull questioned the necessity of having "present day adherents" to claim sacred objects. Dr. Sullivan commented that this definition was one of the toughest to work out, since everything in the world could be considered sacred. This definition was crafted to emphasize those items that have incredible power to Native people. Dr. McManamon stated that disposition of sacred objects would have to be worked out on a case-by-case basis. Dr. Sullivan pointed out that some of these items might also fall under the category of objects of cultural patrimony.

Dr. Walker commented that he was aware of situations in which Native Americans were reluctant to discuss particular sacred objects, making identification difficult. Mr. Tallbull confirmed this, saying that he had been in situations where he didn't tell all he knew because he knew the curators would not believe him. Dr. McManamon stated that this certainly was a problem which needs to be addressed, but suggested that generalized regulations might not be the proper place to do it.

*(b)(5) objects of cultural patrimony*

Ms. Naranjo pointed out that the Zuni War Gods might not be the best example here, as they are both objects of cultural patrimony and sacred objects. Mr. Tallbull detailed several Northern Cheyenne items which might be considered both sacred objects and objects of cultural patrimony. Dr. Sullivan mentioned that while some of the Iroquois' wampum belts had both sacred and patrimonial functions, others, such as the "Washington covenant" belt, were more documentary than religious items, being considered sacred in the same way that we consider the Declaration of Independence sacred. Dr. Sullivan suggested modifying the example to read "**some kinds of** the Wampum belts of the



Iroquois,..." Mr. Tallbull and Ms. Craig pointed out that for their peoples, nothing was truly given or owned by an individual. Everything is cultural patrimony. Ms. Naranjo recognized that while it was not possible to change the language of the law, the distinction between sacred objects and objects of cultural patrimony is a fuzzy one.

*(b)(6) unclaimed cultural items*

Dr. McManamon explained that this term, which is not defined in the statute, was included in the regulations primarily to specify a time frame after which disposition of the cultural items which are not claimed might take place. Mr. Hanslin suggested amending this section to reflect the Federal statute of limitations. The last phrase should read: "...but which are not claimed for a period of ~~five~~ **six** years following notification."

*(b)(7) unaffiliated cultural items*

Dr. McManamon suggested amending the final clause to read: "...identified during or after the inventory **or through a claim made by a lineal descendant, Indian tribe, or Native Hawaiian organization.**" He went on to explain that unaffiliated cultural items are most likely to be those for which there is not very much provenience information, those which are very old, those from areas where the prehistoric past is not very well known and where the modern Indian history has been quite disrupted, and those from areas where there are long gaps between the modern group that may have a legitimate claim and the older group that is only known archeologically. Dr. Sullivan posited that he felt the affiliation of nearly 90% of some collections would be determinable. Dr. Walker disagreed, thinking the percentage of affiliated human remains to be much lower.

*(d) ownership*

Dr. McManamon acknowledged that several committee members were uncomfortable with use of this term.

*(d)(2) lineal descendent*

Dr. Walker suggest modifying the definition as follows: "an individual tracing his or her ancestry directly and without interruption to the individual whose remains and/or associated objects are being claimed under the Act."

*(d)(3) cultural affiliation*

Dr. Walker pointed out that one problem he sees in the draft regulations is that the concept of cultural affiliation shifts throughout the document, starting with an affiliation between tribes and previous cultural groups, but gradually shifting into referring to the affiliation between tribes and objects. Dr. McManamon encouraged Dr. Walker to comment on the language whenever he sees the term used inappropriately.

*(d)(4) prior ownership or control*

Dr. McManamon explained that while the term was used in the statute, no definition was given. This was an attempt to provide guidance on the term. Mr. Hanslin pointed out that his office will be paying particular attention to issues related to ownership and possession and that the committee members might expect this and other sections dealing specifically with ownership concepts to be changed significantly in the next draft. Dr. Sullivan objected to the first three words of the definition -- "ownership is established..." -- in that it implied a simple process of determination. Mr. Hanslin agreed, citing as examples of the complexity concerning the ownership of human remains, questions

of legal title, and Fifth Amendment takings. He suggested that one approach would be a definition of ownership that doesn't define it, but simply provides a framework for making decisions. He agreed to develop suggestions for resolving the issue.

*(e)(8) advice of discovery*

Dr. Sullivan pointed out that this term is used in several different ways within the draft and should be used consistently throughout.

*(e)(12) disposition*

Dr. Walker pointed out that the term is only used in 25 USC 3002 (d) dealing with inadvertent discoveries. Other usage in the regulations may be inappropriate.

§ 10.5 Consultation

*(c)*

Ms. Craig reminded the committee of the earlier discussion concerning "traditional religious leaders." She explained that in her area there is no such person, but there are people who are knowledgeable about traditional spiritual matters and religious values. She felt that the current definition would affect the consultation process in her area since there is no one who really fits the definition of a "traditional religious leader." Dr. McManamon explained that there are two ways to deal with the issue: 1) to add another term in this section identifying the appropriate contact person, or 2) to rework the definition in § 10.4 (a)(11)

Ms. Meninick addressed the committee from the audience, saying that she disagreed with what Ms. Craig had said. She explained that she was at the meeting on behalf of the Yakima Nation and that in her group there are traditional religious leaders, as well as elders who are teaching young people. She reaffirmed that traditional religious leaders should be notified and consulted. Dr. McManamon responded by pointing out that nothing that has been said would prevent traditional religious leaders from being contacted or being involved in the consultation process.

Ms. Naranjo stated that she had a problem with the word "identify." She suggested Ms. Meninick's choice of "notify" might be a softer word, at least for a Southwestern tribal elder. "Identify" implies by name. Notify is not so direct. Dr. McManamon explained that "identify" was used because the purpose of this particular subsection is to try to get additional information from Native people who you are already in contact with. A better word might be found, but "notify" probably not be enough. Dr. Sullivan suggested that perhaps the phrase could be changed to say consult with appropriate traditional leaders. Ms. Naranjo concurred.

Ms. Meninick asked about changing the word "should" to "shall." Dr. McManamon explained that the purpose of the section is to identify people who would be recommended for consultation. He continued that the intent was to try to increase the number of people who might be consulted. But there is no way of ensuring that everybody that is recommended would in fact be consulted. That would have to be a decision that would be made by whoever would be in charge of the particular institution undertaking the consultation.

Ms. Meninick asked about the term "other sources of expertise." Dr. McManamon explained that these sources might include non-Indian people who could serve as sources of information.

(d)

Dr. Walker suggested that "define" be changed to "adopt" or "use" or "implement." These consultation procedures should be implemented, not just written down.

#### § 10.6 Procedures for Consultation

Dr. Sullivan pointed out that "cultural items" should be deleted from the third line.

(a)(1)

Ms. Meninick suggested that the term "applicable" be replaced with "Federally recognized." Dr. Sullivan suggested deleting the term. Dr. Walker explained that he thought in this context "applicable" meant "potentially affiliated," and suggested making that change and then working on a definition for the latter term. Defining "potentially affiliated" in §10.4 Definitions will solve this problem.

(b) *Initiation of Consultation*

Dr. Sullivan asked about the third point in this section, that consultation must begin no later than five years from the date of enactment of the Act. Dr. McKeown explained that the five year deadline was designed to concur with the deadline for completion of the inventories. Some repositories may not have reached the point in their inventories where the cultural affiliation of cultural items is being investigated actively. However, consultation would need to begin by that date in order for the repository to qualify for an extension. He then suggested that perhaps the best way to clarify would be to delete § 10.4 (b)(3) and to rewrite (b)(1) and (b)(2) as follows:

- (b)(1) upon provision of written summary of unassociated funerary objects, sacred objects and objects of cultural patrimony to affiliated Indian tribes and Native Hawaiian organizations, **and no later than November 16, 1993, or**
- (b)(2) the point in the inventory process when the cultural affiliation of human remains and associated funerary objects is being investigated, **and no later than November 16, 1995.**

#### § 10.7 Procedures for Determining Right of Possession

Dr. Walker suggested changing the name of this section to "Priority of Claims," since "right of possession" does not play a role in the statute at all for human remains, only for funerary objects.

(a)(1)

Dr. Walker suggested deleting this section since it wouldn't seem to have any effect on human remains.

(a)(3)

Dr. Walker objected to use of the term "closest cultural affiliation," indicating that it is only used in provisions of the statute dealing with discoveries and excavations, and not to museum collections. The law requires a determination be made that a cultural object either is culturally affiliated or it is not. The degree of affiliation only becomes important when there are more than one claim, and the resolution of that type of dispute is left to the claimants. He

suggested changing this section to read "the Indian tribe or Native Hawaiian organization which **has** cultural affiliation with such remains or objects..."

*(c) Lineal Descent*

Dr. Walker suggested including examples to clarify this section. Ms. Craig pointed out that Native American conceptions of these "relationships" is much different from the Western, biological approach. Dr. McKeown pointed out that the important part of this definition is that it requires an unbroken chain of named individuals between the cultural item and the contemporary claimant.

*(d)(2)(i)*

Dr. Walker questioned use of the term "present day group" -- a term which is not defined in the statute or in the draft regulations -- and suggested changing the sentence to read "existence of an identifiable, present day **Indian tribe or Native Hawaiian organization**."

Dr. Walker questioned the use of subsection (A), (B), (C), and (D) as criteria for determining applicability of the statute to any particular Indian tribe when the statutory language indicates they must be "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." He suggested that subsection (A) should be expanded to indicate what is required for Federal recognition. Ms. Craig and Ms. Naranjo affirmed that such expansion is not really necessary as both recognized and unrecognized tribes know their status. Dr. Walker questioned use of the BIA list, particularly in California where there are groups not on the list that receive Federal support. He didn't want to see all of these California group excluded from consideration. Mr. Hanslin suggested expanding (A) to read "Federally recognized tribes **and those recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians**." Dr. Walker asked what types of non-BIA programs might be included. Dr. McManamon stated that he knew of at least three: the Association of Native Americans, the Department of Education for Indian education programs, and the Indian Health Service.

Dr. Sullivan objected to the wording of (C), suggesting it read "a listing of all current members and their addresses, establishing that a substantial portion of the membership constitutes a present-day **Indian tribe or Native Hawaiian organization**, and/or"

Dr. McKeown suggested that this we should probably go back to scratch on this section, looking at exactly what BIA, DHHS, IHS, and other Federal agency criteria are.

*(d)(2)(ii)*

Ms. Naranjo stated that, at least in the Southwest, the question of the existence of an "identifiable earlier group" is easy. Anasazi would be an example. But she didn't know if the rest of the country knew about Anasazi. Dr. Sullivan suggested that this also may be more difficult to ascertain the further back you go.

*(d)(2)(iii)*

Ms. Craig mentioned that in Alaska, her group's oral tradition indicates their relationship with sites from very long ago, while archeologists make distinctions between people that built their fires inside and outside the house. Dr. Walker explained that there might be traits found in sites associated with an identifiable earlier group that are also used by present day Indian tribes and

Native Hawaiian organization. That is one way to demonstrate the shared group identity.

(d)(3)

Dr. McManamon explained that this section provided guidance for resolving conflicting claims. Dr. Sullivan agreed that this type of guidance would be needed.

#### § 10.8 Procedures for Conducting Inventories and Developing Written Summaries

Dr. Sullivan suggested using examples to clarify the nature of the inventories and written summaries, but agreed in general that the section as written is at about the right level of specificity.

(a)(2) *Standards for Inventory Content*

Dr. Walker expressed his concern that the requirements were not practical. In particular he was concerned with the requirement that the inventory of human remains be done "by individual, or by skeletal elements when individuals cannot be identified." Dr. McManamon explained that he had recognized that problem, but that there was also an issue of accountability. The museum or agency must be able to identify what they have and tell the Indian tribes and Native Hawaiian organizations in some detail. This is the only time that the parties involved have an opportunity to describe the cultural items that might be changing hands. He went on to explain that this problem was recognized by Congress in that the statute authorized a grants program to help museums comply with this aspect of the law. He suggested that the committee not necessarily shy away from detailed inventory requirements because of a lack of resources. Dr. Sullivan suggested that the most important statement in the section was § 10.8 (a)(1), that "the inventory process must be flexible..." and suggested that one way to help solve the problem was to drop the phrase in § 10.8 (a)(2) "or by skeletal elements when individuals cannot be identified." Mr. Hanslin suggested that was also possible to prioritize the inventory process, to begin inventorying the materials you have reason to believe people are actually interested in. Dr. Walker added that this prioritization might also serve as one indication of the museum's good faith in responding to Native American concerns.

#### 10.9 Procedures for Repatriation and Disposition

(h) *Disposition of Federal property as part of a repatriation action.*

Dr. Sullivan identified this as one area which could prove controversial. He saw it as an extremely useful section because it makes clear that compliance with this law supercedes ordinary property disposition. Many private museums have objected that they can't do anything until their state's attorney general approves it.

Mr. Hanslin explained that this is one of the problems of this law. It can require anything it wants from a Federal agency, but it can't change state and corporate law. Museums are either going to have to resolve those problems in order to keep the Federal funding or stop taking Federal funding and obey state laws. Similarly, there have been problems where a private individual may have donated a item on condition that it be displayed at the museum forever. If the museum breaches that agreement they may be liable, and this law doesn't overcome those kinds of arrangements.

Dr. McManamon referred to Section 7 (f) which states that "any museum which repatriates any item in good faith pursuant to this Act shall not be liable..." Mr. Hanslin identified the particular provision as one that may cause problems and result in litigation. He stated that to the extent possible, the regulations must avoid taking peoples' property while, on the other hand, achieving the purposes of the law.

#### 10.11 Procedures for Determining Ownership

Dr. McManamon discuss two possible interpretations of 25 USC 3002 (a) on ownership in the statute, one which follows the priority order down the page: 1, 2a, 2b, 2c, ..., and another which views the priority as between 1 and 2, and within 2 to whoever has the best case. The current draft uses the second interpretation. The effect of this interpretation is to not give priority to tribal land owners in all cases. Dr. McKeown explained that use of the first interpretation also changes the nature of the consultation process on tribal land in that the Federal agency official only has to consult with the tribal land owners, and not with any Indian tribe that might be more closely affiliated with the remains or cultural items.

Dr. Walker pointed out that in § 10.11 (a)(2), the right of possession does not have anything to do with human remains.

#### Nomination of the Seventh Member

Discussions of individuals to be nominated as the seventh member of the committee were conducted on Thursday afternoon and Friday morning. Dr. McManamon outlined the statutory requirements for the nomination of the seventh member. The committee must provide a list of potential appointees that all current committee members "consent to," the phrase used in the statute. He recommended developing a list of at least five people, since they would each need to be contacted to determine if they might be willing to serve and one or two might drop out. It is important that the Secretary be provided with a genuine choice.

During the Thursday afternoon meeting, members discussed the factors which needed to be taken into account in nominating the seventh member. Dr. Sullivan pointed out that there currently is no one on the committee representing archeological concerns.

Ms. Craig raised the issue that there is no one on the committee from the Eastern United States. Dr. Sullivan also raised the issue of geographic representation, stating that committee would surely be criticized if another Arizonan were named. Dr. Walker suggested that, while this was a concern, the committee should nominate the people it felt were qualified and leave the politics of the final choice to the Secretary. In all, the members discussed 26 individuals and at the close of Thursday's discussion, developed a preliminary list of six persons. This list was telefaxed to Mr. Monroe on Thursday evening.

Dr. Monroe participated via teleconference with the rest of the members in Friday morning's discussion. At the request of Ms. Meninick, Ms. Naranjo asked Mr. Monroe whether he would be representing the interests of the Northwest Affiliated Tribes of the Northwest. Mr. Monroe indicated that he would need to build a working relationship with that organization. Each individual on the list was discussed and a vote taken. The final list which was consented to by all six members of the committee included:

*Cecil Antone* (Pima): director, Department of Land and Water Resources, Gila River Indian Community; spokesperson, Cultural Resources Working Group, Inter Tribal Council of Arizona; chairman, Four Tribes Cultural Concern Committee; member, Governor's Archeology Advisory Commission in Arizona.

*David Cole* (Chickasaw/Choctaw): director, Cultural Resources Department, Chickasaw Nation; president, Keepers of the Treasure.

*Jonathan Haas*, archeologist: Vice President, Collections and Research, Field Museum of Natural History.

*G. Peter Jemison* (Seneca): site manager, Ganondagan State Historic Site; chairman, Haudenosaunee Standing Committee on Burial Rules and Regulations; Eastern Regional representative, Board of Trustees, Keepers of the Treasure; member, ad hoc committee for Native American and Museum Collaboration established by the American Association of Museums.

*Leigh Jenkins* (Hopi): director, Hopi Cultural Preservation Office; member, Governor's Archeology Advisory Commission in Arizona.

Dr. McManamon proposed calling the five on the list to find out if they would serve on the committee. If they say yes, we will ask them to submit a statement which we will submit to the Secretary's staff. In transmitting the list to the Secretary, the concerns about expertise and geography that the committee raised would be mentioned. The members concurred.

Prior to ending the telephone hookup, Mr. Monroe proposed that in order for the committee to work effectively together it would make good sense to begin by saying that in the event that there is a very serious concern on the part of any member, the committee should recognize that concern. Dr. Sullivan agreed. Ms. Craig also concurred, stating that the committee will be working together for a long time. Mr. Tallbull summed up the general feeling by saying that while he had a lot of unspoken concerns of the heart, the committee has to develop a working relationship to try to resolve the long standing problems experienced by Indian people. He said that it is important that the members honestly, sincerely work together as a group. He hoped that the group had one thing in mind, to address the concerns of the people of this country, whether it be museums, archeologists, or Indian tribes. The committee must try to do its best to resolve the problems that may come up.

Mr. Monroe recommended that while each member had a certain constituency he or she represented, that it is critical that the committee develop a close working relationship with each other based on respect and based on appreciation for our common cause. He also recommended that future meetings not be held in Washington. He said that it is important to let people have access to the committee, and to not make it appear that this is a remote committee whose activities always take place within the beltway. He recommended that meetings be held in other places where it will be possible for committee members to be accessible to people around the country. Mr. Monroe's recommendations were unanimously supported by the other members.

#### Deputy Solicitor for General Law

Dr. McManamon introduced Robert Moll, the Deputy Solicitor with the Division of General Law. Mr. Moll addressed application of the provisions of the Federal Advisory Committee Act (FACA) and its implementing regulations to the activities of the review committee. Mr. Moll explained that back in the 1970s, Congress recognized that Federal officials were meeting with many outside groups and the

public was unaware of the nature of those dealings. FACA set up a formal structure by which agencies would receive advice from outside groups. Under the statute, an advisory committee consists of any task force, group, or committee which is used in the interest of obtaining advice by the president or agency head. No advisory committee can function without a charter and all activities of advisory committee must be consistent with the charter. FACA and its implementing regulations place a number of administrative requirements on advisory committees: notice of all meetings must be published in the Federal Register; meetings are generally open to the public; all committee records, reports, transcripts, final reports and drafts are available to the public under the Freedom of Information Act.

Dr. Walker asked whether an individual member's notes must also be made available. Mr. Moll explained that anything that becomes part of the record of an advisory committee meeting would need to be made available. This might not include an individual member's notes if they were not made a part of the discussion. And, exemptions can be made for information of a private nature, such as discussion of a particular individual. That kind of information may be withheld.

Dr. Walker inquired about provisions for closing meetings, explaining that he could foresee a situation where the committee might need to discuss information which would include the location of specific archeological sites. Divulging this information might expose those sites to looting. Mr. Moll said that closed meetings are extremely rare. In fact, in his ten years with the Department of the Interior he could think of only one or two cases where closing a meeting was even considered. He suggested that the smartest way to deal with the situation would be to make sure the site coordinates were not discussed within the context of the meeting.

Dr. Walker asked Mr. Moll to clarify the nature of each member's liability when dealing with the type of contentious issues the committee will face. Mr. Moll explained that the committee serves in a strictly advisory capacity and does not make policy decisions. Virtually any conceivable suit filed against the committee would be handled by the Justice Department. He pointed out that the members have no authority to act individually, only as a committee. If someone calls asked for your recommendation as a member of the committee, you can share committee records, reports, transcripts, final reports and drafts with them. You can report what the committee has recommended to the Secretary. But you do not want to put yourself in the position as being thought of as the spokesman for the committee. You need to avoid a situation where someone gets in trouble and says that you told them to do it. Then they can come after you. Mr. Hanslin added that this will never be an issue unless you go well beyond the scope of your advisory role.

#### Deputy Assistant Secretary for Fish and Wildlife and Parks

Deputy Assistant Secretary Salisbury rejoined the meeting and fielded a number of questions from committee members. Both Dr. Sullivan and Dr. Walker expressed concern that deadlines for completion of written summaries and inventories were approaching while the regulations were still in draft form. Mr. Hanslin concurred, stating that it is typically 18 months from the time regulations go out as proposed to when they are published in final form. Ms. Salisbury suggested that perhaps interim guidance should be promulgated to assist Federal agencies and museum in meeting their responsibilities. Mr. Hanslin agreed. Dr. Walker added that another major problem was that the grants program had not been funded. Ms. Salisbury suggested the committee might contact various members of Congress to show how important this is.



Dr. McManamon asked the members to send their comments on the draft regulations

Ms. Craig asked to say a few things. She said that she thought this had been an important meeting. She explained that she was apprehensive when she arrived because she didn't really know what to expect. But she thought that after going through the process she was becoming comfortable -- getting to know the other members and the staff that the committee would be working with. She said that she was looking forward to the next meeting when she would not be so apprehensive, and said that she enjoyed this.

Ms. Naranjo stated that in the Indian way there is always a prayer at the beginning and the end of meetings. She suggested planning for this at future meetings and asked Mr. Tallbull to provide some guidance. Mr. Tallbull noted that in every meeting he had ever attended, Indians always end up doing the invocation.

The meeting was adjourned at approximately noon on May 1, 1992 by Dr. McManamon, the designated Federal official.

[Signed by Rachel Craig, Chair]  
Chair, Native American Graves Protection  
and Repatriation Review Committee

08-28-92  
Date